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In The

Supreme Court of the United States

October Term, 1997

JAMES A. LONG, JAMES A. KING, RAYMOND KING, JERRY PATE LONG, HOMER L. LONG, KELVIN KING, TRUMAN SMITH, SAM FULTON, DAVID SWEENEY, JIMMY SWEENEY, JAMES SWEENEY, BOB GRAVES, JOHN RATLIFF, DENNIS RATLIFF and J.P. RATLIFF,

Petitioners,

vs.

FIRSTRUST CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

CORPORATE DISCLOSURE STATEMENT

Respondent, Firstrust Corporation, has no parent company or nonwholly owned subsidiary company.

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Statutes Cited:

26 U.S.C. § 6050J 1, 2, 7, 9, 10

26 U.S.C. § 6050P 3, 4, 11

Regulations Cited:

Internal Revenue Service Regulations for § 6050J, 49 FR 34459 ..... 2, 9, 10

Internal Revenue Service Regulations for § 6050P .. 4, 11, 12

STATUTES AND REGULATIONS INVOLVED

A. 26 U.S.C.A. § 6050J, that provides in relevant part:

6050J. *Returns relating to foreclosures and abandonments of security.*

(a) In general. Any person who, in connection with a trade or business conducted by such person, lends money secured by property and who

. . .

(2) has reason to know that the property in which such person has a security interest has been abandoned, shall make a return described in subsection (c) with respect to each of such acquisitions or abandonments, at such time as the Secretary may be regulations prescribed.

. . .

(c) Form and manner of return. The return required under subsection (a) with respect to any acquisition or abandonment of property

(1) shall be in such form as the Secretary may prescribed,

(2) shall contain

(A) the name and address of each person who is a borrower with respect to the indebtedness which is secured,

> (B) a general description of the nature of such property and such indebtedness,
>
> . . .
>
> (D) in the case of a return required under subsection (a)(2), the amount of such indebtedness at the time of such abandonment, and
>
> (E) such other information as the Secretary may prescribe. . . .

B. Internal Revenue Service Regulations For § 6050J, 49 FR 34459 that provide in relevant part:

> Abandonments:
>
> Q-17: For purposes of this reporting requirement, when has an abandonment occurred?
>
> A-17: An abandonment has occurred when the objective facts and circumstances indicate that the borrower intended to and has permanently discarded the property from use.
>
> Q-18: Does the fact that a lender knows or has reason to know of an abandonment of property securing a loan mean that the borrower is entitled to an abandonment loss?
>
> A-18: No. The definition of an abandonment of property securing a loan in A-17 applies only for purposes of this reporting

> requirement and is not intended to apply for other purposes, such as determining whether a borrower would be entitled to an abandonment loss.

C. 26 U.S.C.A. § 6050P that provides in relevant parts:

> *Returns relating to the cancellation of indebtedness by certain financial entities.*
>
> (a) In general.
>
> Any applicable financial entity which discharges (in whole or in part) the indebtedness of any person during any calendar year shall make a return (at such time and in such form as the Secretary may by regulations prescribe) setting forth —
>
> (1) the name, address, and TIN of each person whose indebtedness was discharged during such calendar year,
>
> (2) the date of the discharge and the amount of the indebtedness discharged, and
>
> (3) such other information as the secretary may prescribe.

The amendments made by this section apply to discharges of indebtedness after December 31, 1993, except that in case of a governmental entity, it applies to discharges of indebtedness after August 10, 1993.

D. Internal Revenue Service Regulations for § 6050P that provide in part:

> B. Facts and circumstances indicating that an indebtedness has not been discharged include . . . the sale or packaging for sale of the indebtedness by the creditor . . .
>
> Further, no additional reporting or Form 1099-C correction is required if a creditor receives a payment of all or a portion of a discharged indebtedness reported under this section for a prior calendar year.

MISSTATEMENTS OF FACT OR LAW IN THE PETITION

The Respondent, Firstrust Corporation, respectfully addresses the following perceived misstatements of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. The perceived misstatements of fact or law in the petition are:

a. On page 3 Petitioners refer to 26 U.S.C. § 6050P as one of the statutory provisions involved. This is a misstatement of law. The subject 1099A forms were mailed to the male plaintiffs in January, 1992. 26 U.S.C. § 6050P states that it applies to discharges of indebtedness after December 31, 1993, with the exception that as to governmental entities, said section applies to discharges of indebtedness after August 10, 1993, with the result that such § 6050P was not in effect at any time material to this case.

b. Petitioner's statement on page 4 of their petition that the issuance of the subject 1099A forms was done in conjunction

with the "write-off" of the debt on the records of the institution is a half truth in that it omits the material information that there was a contemporaneous transfer of the loan file to the Asset Recovery Division of the Resolution Trust Corporation and later packaging and sale of the subject judgment and other judgments by the Resolution Trust Corporation to Firstrust Corporation.

c. Petitioners state that the 1099A's were a report to the IRS of a discharge of the subject 1990 judgment. As stated in footnote 8 in the Opinion of the United States Court of Appeals for the Fifth Circuit, the 1099A's had more to do with complying with what was thought to be required by the IRS or RTC Regulations, and had more been intended doubtless some more customary or formal method of handling the matter would have been employed.

STATEMENT OF THE CASE

Respondent believes that the Statement of the Case made by Petitioners is incorrect and incomplete and makes the following Statement of the Case.

A. Nature of the Case

1. This is a suit for a declaratory judgment and money damages and attorney's fees and a counter claim for recovery of attorney's fees.

B. Course of Proceedings and Disposition in the United States District Court

2. This case was tried before the Court without a jury.

3. On January 9, 1995, the Petitioner's, plaintiffs in the trial court, brought suit against the defendants Kenneth T.

Turner, individually, and Firstrust Corporation (the Respondent herein) for a declaratory judgment that they were released from liability on a judgment based upon the cause of action of quasi estoppel arising out of the issuance of a 1099A form to each male plaintiff and resulting taxable income to them and write off of the debt on the records of the Resolution Trust Corporation (RTC), and for a money judgment for wrongful garnishment, conversion, unreasonable collection efforts, and negligence and alleged individual liability of Kenneth T. Turner.

4. Respondent plead appropriate denials and affirmative defenses and a counter claim for recovery of attorney's fees.

5. The court entered its final judgment that the subject judgment had been released and that Respondent cannot now collect from the Petitioners on such judgment. The court further ordered that all parties take nothing on their claims against each other and that each party bear its own cost and attorney's fees. The final judgment is Appendix B to the Petition for Writ of Certiorari.

6. The Respondent timely filed its notice of appeal and Petitioners timely cross appealed.

C. Judgment and Opinion of the United States Court of Appeals

7. The judgment and opinion of the United States Court of Appeals for the Fifth Circuit ("Court of Appeals") is a correct statement of the case, and is set out as Appendix A to the Petition for Writ of Certiorari.

8. The Court of Appeals applied a de novo standard of review for application of State law by the District Court and made its conclusion:

> We conclude that the district court erred by granting any relief to appellees other than Dennis Ratliff, John Ratliff, and Truman Smith, and that as to said three appellees no relief should be awarded other than a credit on their liability on the principal amount of the August 1990 judgment in the amount of $1,059.39 each for Dennis Ratliff and John Ratliff and $1,050 for Truman Smith (said credit in each case to be as of the date each of said parties respectively paid said amounts to the IRS in respect to the 1099As issued them by New MeraBank).
>
> Accordingly, the judgment of the district court is affirmed in part and reversed in part, and the cause is remanded for entry of judgment in conformity herewith.

D. Final Judgment on Mandate After Appeal

9. On May 13, 1998, the United States District Court signed and filed its Final Judgment on Mandate After Appeal that is set out as Appendix E to the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED FOR THE FOLLOWING REASONS:

A. Preemption Analysis

10. As this writer understands Petitioner's position, it is that the Internal Revenue Code ("Code") § 6050J and the regulations thereunder providing for returns relating to

foreclosures and abandonments of security overruled all State laws relating to a discharge of a judgment or any other debt and expanded estoppel damages to grant a windfall to the debtors.

11. Such State laws would apparently cover statutory provisions such as the Uniform Commercial Code as well as the State's common law provisions for release of a judgment or indebtedness.

12. The Petitioners would have this Honorable United States Supreme Court overrule all State laws on discharge of a judgment and any other debt as well as expanding estoppel damages to grant a windfall to debtors arising out of a creditor's use of Internal Revenue Service reporting forms, rather than applying State law to determine whether or not a judgment has been released and, if applicable, the amount of estoppel damages, as required by *Erie R. Co. v Tompkins*, 304 US 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 ALR 1487 (1938).

13. Petitioners' argument is fatally defective, for the reason that petitioners have cited no authority for their novel position that by issuing Internal Revenue Service reporting forms 1099A the creditor cannot thereafter collect a judgment, and it is respectfully submitted that no authority is cited, because no authority exists.

14. Historically States have exercised primary authority in commercial matters concerning releases of state court judgments and discharges of indebtedness. As the Texas Supreme Court reasoned concerning an alleged preemption by Federal law in *Hyundai Motor Co., et al. v. Alvarado, et al.*, 1998 Tex. LEXIS 87, 41 Tex. Sup. J. 947,

> Thus, in all preemption cases, and particularly in those in which Congress has "legislated . . . in a

> field which the States have traditionally occupied," . . . (preemption analysis) "starts with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Medtronic, Inc. v Lohr, 518 U.S. 470, 116 S. Ct. 2240, 2245, 135 L. Ed. 2d 700 (1996).

> This analytical framework is crucial in our federal system, "for if in close or uncertain cases a court proceeds to preempt state laws where that result was not clearly the product of Congress's considered judgment, the court has eroded the dual system of government that ensures our liberties, representation, diversity, and effective governance." KENNETH STARR ET AL., THE LAW OF PREEMPTION: A REPORT OF THE APPELLATE JUDGES CONFERENCE, AMERICAN BAR ASSOCIATION (*12) 40 (1991); *see also Hernandez-Gomez v Leonardo,* 180 Ariz. 297, 884 P.2d 183, 190 (Ariz. 1994) (noting that a rule requiring explicit indication of preemptive intent "transfers the decision about preemption and its reach from the post-hoc speculation of lawyers to the forum where it should be argued: the legislature, where the competing interests may be reconciled before the statute is passed"), vacated, 514 U.S. 1094, 115 S. Ct. 1819, 131 L. Ed. 2d 742 (1995).

15. Under Petitioner's preemption analysis the IRS reporting forms 1099A conclusively establish against the creditor a release of the subject 1990 judgment.

16. It is respectfully submitted that it is a bizarre argument to state that the Code § 6050J and regulations thereunder, neither

of which mention a release of indebtedness, have impliedly overruled all State laws on a release of a judgment or other indebtedness.

17. Such a rule would certainly be a surprise to the Internal Revenue Service.

18. The subject IRS 1099A forms were issued under § 6050J of the Code for returns relating to foreclosures and abandonment of security and the IRS regulations thereunder. Under such regulations, the IRS 1099A forms are for reporting purposes only and cannot be used to determine whether a borrower would be entitled to an abandonment loss by the following language:

> Abandonments:
>
> Q-17: For purposes of this reporting requirement, when has an abandonment occurred?
>
> A-17: An abandonment has occurred when the objective facts and circumstances indicate that the borrower intended to and has permanently discarded the property from use.
>
> Q-18: Does the fact that a lender knows or has reason to know of an abandonment of property securing a loan mean that the borrower is entitled to an abandonment loss?
>
> A-18: No. The definition of an abandonment of property securing a loan in A-17 applies only for purposes of this reporting requirement and is not intended to apply for other

> purposes, such as determining whether a borrower would be entitled to an abandonment loss.

19. If the subject IRS 1099A form cannot be used to determine whether a borrower would be entitled to an abandonment loss, how can such form conclusively establish against a creditor a release of the subject 1990 judgment?

20. While Respondent continues to insist that 26 U.S.C. § 6050P, providing for returns related to the cancellation of indebtedness by certain financial entities, does not apply to this case, for the reason that it was not in effect at any material time, the Internal Revenue Service did provide in the regulations under § 6050P for collection of an indebtedness after a report of a discharge of such indebtedness by a provision of the Internal Revenue Service regulations for § 6050P and IRS form 1099C as follows:

> Further, no additional reporting or Form 1099-C correction is required if a creditor receives a payment of all or a portion of a discharged indebtedness reported under this section for a prior calendar year.

21. If, as advocated by Petitioners, the Internal Revenue Code prevented further collection of an indebtedness for which a report of discharged indebtedness under the Internal Revenue Service forms 1099C had been made, what is the purpose of the above quoted provision?

22. Such regulation under § 6050P also states in part:

> B. Facts and circumstances indicating than an indebtedness has not been discharged include . . .

> the sale or packaging for sale of the indebtedness by the creditor. . . .

23. As correctly noted in the opinion of the United States Court of Appeals for the Fifth Circuit, the RTC sold the subject judgment to Respondent. Under the above quoted provision of the subject IRS Regulation, the judgment had not been released.

24. Petitioners do not contend that under State law the judgment was released. That the Petitioners did not owe the judgment or that they paid the same was never contended. What is contended by Petitioners is simply that they are entitled to a windfall of a release of the judgment.

25. Petitioners' Petition for Writ of Certiorari should be denied for the following reasons:

a. The purpose of the Internal Revenue Code ("Code") and Internal Revenue Service ("IRS") regulations are to raise tax revenue and not to adjudicate property rights among third parties.

b. There is no conflict between State law and the Code, for the reason that State law governs when a judgment has been released and the Code governs whether or not any cancellation of indebtedness resulting therefrom is taxable.

c. Under the Internal Revenue Service regulations the subject IRS 1099A forms are for reporting purposes only and cannot be used for a proof of an abandonment or discharge of indebtedness.

d. 26 U.S.C. § 6050P for reports by financial institutions of a discharge of indebtedness is not a statutory provision involved in this case, for the reason that it was not in effect during any material times in this case, and in the alternative, the IRS regulations thereunder support Respondent's position.

B. Petitioners' Case Is Moot

26. Petitioners' lawsuit is moot. In support of this position, Respondent would respectfully show that Petitioners' sole cause of action in the United States District Court to prevent collection of the judgment was based upon the State of Texas legal doctrine of quasi estoppel. Petitioners failed to prove the elements of quasi estoppel in the trial court and the United States District Court judge made no findings of fact thereon. For such reason, this Petition for a Writ of Certiorari should be denied.

27. In the alternative, assuming for purposes of argument only, that petitioners are entitled to any relief under quasi estoppel, recovery under an estoppel theory is limited to the amount necessary to compensate for the loss suffered. One recovering under promissory estoppel should not experience a windfall. *Nimrod Marketing (Overseas), Ltd. v. Texas Energy Investment Corp.*, 769 F.2d 1076, 1080 (5th Cir. 1985), *cert. denied*, 475 U.S. 1047, 106 S. Ct. 1266, 89 L. Ed. 2d 575 (1986); *Keado v. United States*, 853 F.2d 1209, 1218 (5th Cir. 1988).

28. Petitioners received all of the relief to which they were entitled when petitioners Dennis Ratliff and John Ratliff received a credit on the subject August, 1990, judgment in the amount of $1,059.39 each and Truman Smith received a credit for $1,050.00, as their actual damages for income taxes paid

because of the 1099A forms, and petitioners are not entitled to a windfall of a release of the entire judgment. Petitioners' petition for a writ of certiorari should be denied, for the reason that Petitioners' suit is moot.

C. Waiver

29. The argument now raised by Petitioners in their Petition for Writ of Certiorari was not raised or resolved in the lower Courts and was first made by Petitioners in their, "Motion For Stay Of Mandate Pending Petition For Writ Of Certiorari" and was, therefore, waived.

30. Ordinarily, this Honorable United States Supreme Court does not decide questions not raised or resolved in the lower Court. *Youakim v Miller,* 425 US 231, 47 L Ed. 2d 701, 96 S. Ct. 1399. For such reason, the petition should be denied.

D. De Novo Standard of Review

31. The United States Court of Appeals for the Fifth Circuit correctly applied a de novo standard of review to determine that under State law the judgment had not been released. *Salve Regina College v Russell,* 499 US 225, 113 L. Ed. 190, 198, 111 S. Ct. 1217.

E. Estoppel

32. Twenty-one of the petitioners did not report income from the 1099A forms on their respective income tax returns filed with the IRS, and are, therefore, estopped to make the argument now made to this Court.

CONCLUSION

It is respectfully submitted that Respondent has conclusively demonstrated that the petition should be denied.

Respectfully submitted,

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